STATE OF MICHIGAN

COURT OF APPEALS

DAVID DEITERING, STEVEN DEITERING, and MARGARET HEAD,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF GRAND BLANC a/k/a GRAND BLANC TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED
January 27, 2004

No. 244158
Genesee Circuit Court
LC No. 01-07066-NZ

Before: O'Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

I. Material Facts and Proceedings

On February 9, 2001, the sewer in plaintiff Margaret Head's basement backed up. On that date, Head's two sons, Steven Deitering and David Deitering, were staying at Head's residence. As a result of the sewage problem, plaintiffs filed a four count complaint alleging claims of trespass-nuisance, unlawful taking of property, breach of personal services and/or other contract(s), and a violation of the Michigan Consumers Protection Act (MCPA).

Subsequently, defendant brought a motion for summary disposition regarding its liability pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Defendant argued that plaintiffs failed to present any evidence that an event, action, or omission "set in motion" by defendant caused a taking or trespass-nuisance. Defendant further argued that there was no evidence establishing a taking and that plaintiffs failed to establish a claim for breach of contract or for a violation of the MCPA.

In support of their motion for summary disposition, defendant presented the affidavit of Daniel Potter, defendant's sewer consultant. Potter indicated that on February 8, 2001, through February 9, 2001, approximately 1.35 inches of rain fell, mostly within a twelve-hour period, and that this rain, coupled with the effects of four inches of melted snow and flooding of the "Land Drainage System," overwhelmed the sanitary sewage system. Additionally, Potter stated that there were no failures of any critical equipment or processes in defendant's sanitary sewage

system and that the system operates within all acceptable engineering standards during normal flow periods.

In response to defendant's motion for summary disposition regarding the issue of liability, plaintiffs filed a counter-motion for summary disposition and argued that a strict liability standard applied rather than a negligence standard. With respect to this argument, plaintiffs contended that they did not need to demonstrate that the sewage system was defective, but only that water and/or sewage flowed through the sewage system owned or operated by defendant and that it flowed into the flood drains and toilets of Head's residence. Plaintiffs further asserted that defendant did not present facts to support its "Act of God" defense, and that they stated valid contract and MCPA claims against defendant. In responding that defendant was unable to support its "Act of God" defense, plaintiffs relied on statements contained in an article taken from the Flint Journal for their proposition that the sewage system was old and inadequate.

In opposition to plaintiffs' response, defendant argued that plaintiffs failed to respond to its (C)(10) motion with affidavits or other credible documentary evidence necessary to avoid summary disposition. Defendant contended that strict liability was not the proper standard for determining liability, and that plaintiffs were required to demonstrate that the trespass or interference with the use or enjoyment of land was caused by a physical intrusion set in motion by defendant. Defendant also argued that plaintiffs failed to demonstrate a taking because the sewage backup was based on a single event that did not render the Head residence valueless or unmarketable.

After hearing oral argument on the motions[1] for summary disposition, the trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). In granting defendant's motion for summary disposition, the trial court stated the following:

> In this case we have nothing that's been presented to show that the government set this into motion at all. Clearly, it was a situation where there was a large rain event which overtaxed the system, obviously.
>
> And, certainly, there can be arguments made, as Mr. Maciak has already presented, as to whether there should have been a backup system or a larger system or whatever the case may be, but that's not what the law looks at. It looks at whether or not the governmental entity set, their system set in motion the sewage backup. And there's just been no evidence that's been presented on that particular issue; and, therefore, I do think it's appropriate to grant summary disposition on that claim.
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> * * *

[1] Defendant also brought a motion for summary disposition regarding the issue of proximate cause. The trial court's decision was not based on this issue and this motion is not relevant on appeal. Also, plaintiffs filed a brief in support of their "motion" for counter-summary disposition, although no such motion was located in the lower court record.

> [B]ut the problem we have here is the governmental entity, as far as the law is concerned, can't be held liable, unless there's evidence to show that they set the backup in motion, either through some defect in the system or problem with the system, and that just hasn't been shown, so I'll grant your motion.

II. Standard of Review

This Court applies the following standard in reviewing the propriety of a trial court's decision made pursuant to MCR 2.116(C)(10):

> A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Singerman v Muni Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). Summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue about any material fact. When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider all pleadings, affidavits, depositions, and other documentary evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The nonmoving party has the burden of rebutting the motion by showing, through evidentiary materials, that a genuine issue of disputed fact does exist. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). [*Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 528-529; 660 NW2d 384 (2003).]

III. Analysis

A. Trespass-nuisance

Plaintiffs first argue that the trial court erred in denying their motion for summary disposition. Specifically, plaintiffs contend that the trial court erroneously concluded that they were required to demonstrate a defect that was "caused by" or "set in motion by"[2] defendant, arguing that the establishment of control by defendant of the instrumentality through which the intrusion came is sufficient to establish liability under the trespass-nuisance exception to governmental immunity.

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[2] Until recently, Michigan courts followed the principles set forth by *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 145-147, 165-169; 422 NW2d 205 (1988), that governmental agencies are not immune from trespass-nuisance claims. In *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), the Supreme Court abrogated the trespass-nuisance exception, thus overruling *Hadfield* and its progeny, including *Li v Feldt (After Remand)*, 434 NW2d 584; 456 NW2d 55 (1990). However, in overruling *Hadfield*, the *Pohutski* Court held that its decision applied only to cases brought on or after April 2, 2002. *Pohutski*, *supra* at 699. Because the instant action was filed prior to April 2, 2002, the *Hadfield* line of cases applies.

Trespass-nuisance was defined by the Michigan Supreme Court as a "trespass or interference with the use or enjoyment of land caused by a physical intrusion that is *set in motion* by the government or its agents and resulting in personal or property damage." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988) (emphasis added), overruled by *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). The *Hadfield* Court added that the elements of trespass-nuisance may be summarized as: (1) condition (nuisance or trespass), (2) cause (physical intrusion), and (3) causation or control (by government). *Id*. The Court further explained that "[t]respass-nuisance shall be defined as a direct trespass upon, or the interference with the use or enjoyment of, land that *results from a physical intrusion caused by, or under the control of, a governmental entity*." *Id*. at 145 (emphasis added).

Plaintiffs first argue that trespass-nuisance is a strict liability claim that may be established if plaintiffs demonstrate that water and/or sewage flowed into their residence through the sewage system owned or operated by defendant. In other words, plaintiffs argue that if they are able to demonstrate that the sewage system caused a nuisance or trespass and the system was under defendant's control, then defendant should be held liable for trespass-nuisance. Plaintiffs' theory of liability ignores the precise language set forth in *Hadfield*, which requires a plaintiff to demonstrate that the intrusion was "set in motion" by the governmental entity or that the interference with the plaintiff's use or enjoyment of the land resulted from *a physical intrusion* caused by, or *under the control of, a governmental entity*. *Hadfield*, *supra* (emphasis added). Accordingly, in order to demonstrate defendant's liability under the alternate theory, plaintiffs must demonstrate that the physical intrusion itself was under defendant's control. *Id*.

In support of their argument that control over the sewage system is enough to establish liability, plaintiffs point to *Continental Paper & Supply Co, Inc v Detroit*, 451 Mich 162; 545 NW2d 657 (1996) and *CS&P, Inc v Midland*, 229 Mich App 141, 145; 580 NW2d 468 (1998). In *Continental*, the Michigan Supreme Court was presented with an issue regarding whether the city defendant was liable under the trespass-nuisance exception to governmental immunity for damages caused by a fire that originated at buildings to which the city did not have title. *Continental*, *supra* at 163. The Court held that the city could not be held liable for trespass-nuisance because the city neither owned nor controlled the buildings. *Id*.

The *Continental* Court disagreed with this Court's conclusion that there was sufficient evidence to allow a jury to determine that the city possessed the requisite control over the premises such that the city *could* be held liable for its failure to abate the nuisance. *Id*. at 164. Without determining whether control over the premises alone was sufficient to find a defendant liable for trespass-nuisance, the Court rejected each of the plaintiffs' theories of control, which included the definition of control relied upon by this Court in *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 606; 528 NW2d 835 (1995).[3] *Continental*, *supra* at 165. The Court

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[3] Although the *Baker* Court indicated that "control" could be found "where the defendant creates the nuisance, owns or controls the property from which the nuisance arose, or employs another to do work that he knows is likely to create a nuisance," the Court did not address the issue of whether control, by itself, was sufficient to hold a defendant liable under the trespass-nuisance exception to governmental immunity. *Baker*, *supra* at 606-607. In fact, in *Baker*, the Court
(continued…)

thus did not address the issue central to this case, which is whether control over the premises is by itself sufficient to impose liability on defendant for trespass-nuisance.

Additionally, we find *CS&P* distinguishable from the instant case. In *CS&P*, the issue before this Court was whether the trial court erred in ruling that the plaintiffs did not need to prove negligence as a predicate to establishing liability under the trespass-nuisance exception to governmental liability. *CS&P*, *supra* at 144. Quoting *Peterman v Dep't of Natural Resources*, 446 Mich 177, 205, n 42; 521 NW2d 499 (1994), the Court stated:

> "*While a governmental entity must have been a proximate cause of the injury*, 'the source of the intrusion' need not originate from 'government-owned land.' *Li [v Feldt (After Remand)*, 434 Mich 584; 456 NW2d 55 (1990)], *supra* at 594, n 10. Moreover, '[n]egligence is not a necessary element of this cause of action.' *Robinson v Wyoming Twp*, 312 Mich 14, 24; 19 NW2d 469 (1945). This is true even if an instrumentality causing the trespass-nuisance was 'built with all due care, and in strict conformity to the plan adopted by' a governmental agency or department. *Seaman v City of Marshall*, 116 Mich 327, 329-330; 74 NW 484 (1898)." [*CS&P*, *supra* at 145-146 (emphasis added).]

The *CS&P* Court then held that the trial court did not err in ruling that the plaintiffs did not need to prove *negligence* as a predicate to establishing liability under the trespass-nuisance exception to governmental immunity. *Id*. at 146. Again, the precise issue facing this Court in this case, i.e., whether control alone is sufficient to establish liability of a governmental entity under the trespass-nuisance exception, was not addressed.

Unlike in *CS&P*, the issue here is not whether plaintiffs must demonstrate negligence, but rather, whether a demonstration of control over the sewage system is, in and of itself, sufficient to subject defendant to liability under the trespass-nuisance exception. In accordance with the above principles, plaintiffs could not rely solely upon defendant's control of the sewage system in support of their trespass-nuisance claim. Plaintiffs must demonstrate that defendant was a *proximate cause* of the injury and that defendant set in motion or had control of the physical intrusion. *Hadfield*, *supra*; *CS&P*, *supra*.

Plaintiffs alternatively argue that the trial court erred in granting defendant's motion for summary disposition because questions of material fact exist regarding plaintiffs' claim of liability for trespass-nuisance. In support of their contention that there is a genuine issue of material fact, plaintiffs point to an article contained in the Flint Journal[4] Defendant counters that the newspaper article was inadmissible evidence that could not be considered by the trial court, and that plaintiffs failed to present any admissible evidence that defendant set in motion the nuisance or trespass.

(…continued)

declined to address the issue because the plaintiffs did not address the issue of whether the defendant controlled the property at all. *Id*. at 607, n 1.

[4] According to plaintiffs, the Flint Journal contains "admissions" by defendant's supervisor that defendant's sewer system was old and inadequate.

In order to support or defeat a motion for summary disposition pursuant to MCR 2.116(C)(10), admissible documentary evidence must be filed along with the motion. *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991). "Opinions, conclusory denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *Id*. at 364. "[N]ewspapers are [generally] hearsay evidence of the facts stated within them and are not admissible in evidence to prove such facts." *People v Burt*, 89 Mich App 293, 295-296; 279 NW2d 299 (1979); see also *Detroit v Larned Assoc*, 199 Mich App 36, 39-41; 501 NW2d 189 (1993). Plaintiffs have failed to demonstrate that the newspaper article was offered for a non-hearsay purpose or that it falls within any exception to the hearsay rule, and have failed to present any other evidence in support of their contention that the sewage system was defective. Accordingly, summary disposition was properly granted with respect to plaintiffs' trespass-nuisance claim.

B. Breach of Contract[5]

Finally, plaintiffs argue that the trial court erred by dismissing the entire case because it did not address plaintiffs' remaining breach of contract claim. Plaintiffs argue that there was an express or implied contract between Head and defendant for a safe and effective sewer system, and that the Deiterings were intended beneficiaries of this contract. Defendant contends that this claim was rendered moot pursuant to the trial court's finding that defendant did not "set in motion" the events leading to the sewer backup.

Although defendant sought dismissal of plaintiffs' breach of contract claim in its motion for summary disposition, the trial court did not explicitly address this issue. Regardless, we affirm the trial court's dismissal. Plaintiffs have offered no law or argument in support of their contract claim, and in fact are quite unclear as to what theory they are even pursuing. We therefore deem this issue waived for failure to adequately brief the issue. *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996).

Affirmed.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray

[5] In their reply brief, plaintiffs indicated, "Relative to our theories of liability we are now limiting our appeal to only our trespass-nuisance claim and our contract claim." Accordingly, we do not address the remaining taking claim or the claim for violation of the MCPA.